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NOTES OF RECENT CASES.

Kumaraswami Sastri, J. C.S. Nos. 387 and 388 of 1925.
5th December, 1928.

Part performance—Doctrine of—Absence of contract of sale—Applicability—Limitation Act, Art. 91—*Starting point of limitation.*

The doctrine of part performance can only be applied to a case where there is a contract between the parties and everything has been done except the execution of a conveyance.

The starting point of limitation for Art. 91 of the Limitation Act is the date when the undue influence ceased.

S. Dyraiswami Aiyar and *K. S. Rajagopala Aiyangar* for Plaintiff.

T. R. Venkatrama Sastri, V. Radhakrishniah, A. Visvanatha Aiyar and *V. Thyakarajan* for Defendants.

N. S.

Jackson and Reilly, JJ. S.A. No. 112 of 1926.
10th December, 1928.

Contract—Stranger—Right to sue on—Person in whose favour charge has been created.

Though a stranger to a contract cannot sue on it, if a charge has been created in his favour, he can enforce the charge by a suit.

Where an award was made in terms of a razinamah by which a charge was created for a certain amount in favour of a person who was not a party to the suit in which the reference to arbitration was made, *held,* that he or his representatives could institute a suit to enforce the charge.

6 A. 322 distinguished.

32 A. 410, 33 M. 238 and 22 M.L.J. 159 referred to.

B. Sitarama Rao and *S. Nataraja Nadar* for Appellant.

R. Kuppusami Aiyar for Respondent.

N. S.

Odgers and Venkatasubba Rao, JJ. S.A. No. 859 of 1925.
10*th December,* 1928.

Hindu Law—Joint family—Sole surviving coparcener—Gift by—Subsequent adoption by the widow of a previous coparcener—Adopted son if can question the gift.

Where, in a joint Hindu family consisting of a father and son, the son died leaving behind him a widow, authorising her to adopt, and, before the adoption, the father who became the sole surviving coparcener gifted some of the joint family properties in favour of his daughters and, subsequently, the widow of the son adopted a boy in pursuance of her husband's authority

Held, that the rights of the adopted son did not relate back to the death of his adoptive father so as to invalidate the alienation of the sole surviving coparcener and that the alienation was binding on him.

22 M.L.J. 85 followed.

1 Mad. 64 (P.C.), 43 Bom. 178 and 41 Mad. 855 explained.

S. Varadachariar and *A. Satyanarayana* for Appellants.

A. Krishnaswami Aiyar and *Ch. Raghava Rao* for Respondents.

N. S.

Phillips and Odgers, JJ. C.M.P. No. 2776 of 1928.
11*th December,* 1928.

Civil Procedure Code, S. 110—*Valuation of appeal below Rs.* 10,000 *and memo of objections above Rs.* 10,000—*Appeal allowed but memo dismissed—Subject-matter same in both—Judgment if a reversing one.*

Where an appeal and a memo of objections were filed in the High Court against the decree of the Lower Court and the valuation of the appeal was about Rs. 7,000, but that of the memo of objections was over Rs. 10,000, and the subject-matter involved in both the appeals and the memo was the same, and the High Court, allowed the appeal and dismissed the memo of objections,

Held, (on an application by the respondent in the appeal for leave to appeal to the Privy Council), that the judgment of the High Court was a reversing one and leave to appeal ought to be granted.

N. S. Srinivasa Aiyar for Petitioner.

T. M. Krishnaswami Aiyar and *M. S. Venkatarama Aiyar* for Respondent.

N. S.

Ramesam and Venkatasubba Rao, JJ. C.R.P. No. 1644 of '27, etc.
11*th December,* 1928.

Court Fees Act, Ss. 17 (1) *and* 17-*A—Order of Hindu Religious Endowment Board—Application to set aside—Court-fee payable.*

The proper Court-fee payable on an application to set aside an order of the Hindu Religious Endowment Board under S. 84 (2) of the Religious Endowment Act is Rs. 15 under Article 17 (1) of the Court Fees Act and not Rs. 100 under Art. 17-A.

P. G. Krishna Aiyar and others for Petitioners.

P. Venkatramana Rao for Respondents.

N. S.

Ramesam and Venkatasubba Rao, JJ. A.S. No. 354 of 1924
11*th December*, 1928.

Civil Procedure Code, Order II, Rule 2—Instalment mortgage bond—Provision for calling entire amount on default of one instalment—Additional provision for enhanced rate of interest—Suit for recovery of amount of an instalment—Reservation of right to sue for subsequent instalments—Subsequent suit for later instalments—If barred.

A mortgage for Rs. 5,000 provided for the re-payment of the amount by four yearly instalments with interest at 8 per cent. per annum. It contained a further clause to the effect that, if default was made in payment of any instalment of principal or interest due thereon, the provision as to payment by instalment should have no effect and the mortgagor should be liable to pay the entire amount due under the mortgage irrespective of the instalment dates, and that interest on the overdue instalment should be payable at 10 per cent. Default was made in the payment of first instalment and thereupon the mortgagee instituted a suit to recover the first instalment of Rs. 1,250 and the interest Rs. 400, together with interest at 10 per cent. on the aggregate amount from the date when the instalment became due and obtained a mortgage decree. In the plaint in this suit, the mortgagee stated that he waived the right to call the entire amount and reserved his right to sue for subsequent instalments as and when they should become due. Subsequently the mortgagee filed the present suit to recover the amount due after the expiry of the periods prescribed for the subsequent instalments.

Held, that the suit was not barred by Order II, Rule 2 of the Civil Procedure Code.

A. I. R. 1928 Mad. 705 distinguished.

B. Sitarama Rao for Appellant.

K. Bhashyam Aiyangar for *K. P. Sarvothama Rao* for Respt.

N. S.

The Chief Justice and Jackson, J. O. S. A. No. 28 of 1927.
11*th December*, 1928.

Contract Act, S. 91—Scope of—Contract to the contrary—If can prevail—Course of dealings between the parties.

Section 91 of the Contract Act must be read subject to a contract, express or implied, to the contrary.

Where the course of dealings between the parties showed that, whenever an order was received to send silver, it was always sent uninsured at owner's risk by railway, and the consignor sued the consignee for the price of silver sent uninsured by railway and it was proved that he had delivered silver to the railway,

Held, that the consignee was liable for the price though he did not receive silver, an iron parcel having been substituted for the silver parcel subsequent to the receipt of the silver parcel by the railway.

V. V. Srinivasa Aiyangar, K. V. Krishnaswami Aiyar and *N. Swaminathan* for Appellant.

Vere Mockett and *G. Rajagopalan* instructed by *N. T. Shamanna* for Respondent.

N. S.

Phillips and Thiruvenkatachariar, JJ. A.S. No. 337 of 1926.
14th December, 1928.

Hindu Law—Joint family—Family business—Suit for partition by a member—Right to a share of profits subsequent to suit—Future profits—Deduction for labour and skill of other partners—Election—When binding.

In the case of a trade carried on by a joint family as a family business, a member of the family is entitled at his option either to claim his share in the partnership assets as on the date of his suit for partition together with interest thereon or to claim his share in the future profits of the business subsequently carried on by the defendants.

4 L.W. 521 not approved.

23 Bom. 544 (P.C.) and 42 C. 914 (P.C.) referred to

An election by a person, in order to be binding on him, should be made at the time when he had full and complete knowledge of the two alternatives between which he was electing.

In ascertaining the future profits to which a retiring partner would be entitled, some allowance should be made for the labour and skill of the other partners utilised in the business.

T. M. Krishnaswami Aiyar and *S. Anantarama Aiyar* for Appellant.

S. Varadachariar, K. R. Rangaswami Aiyangar and *N. Sivaramakrishna Aiyar* for Respondents.

N. S.

Jackson and Reilly, JJ. S. A. Nos. 1434 to 1438 of 1925.
12th December, 1928.

Inam—Pre-settlement inam—Original grant by predecessor of Zemindar—Possession of inamdar till enfranchisement by Government—Validity of enfranchisement by Government—Right of Zemindar—Madras Act II of 1894, *Section* 17.

Village service inams granted prior to the permanent settlement were in the nature of lakhiraj grants and were not taken into account in fixing the peishcush.

11 L.W. 186 followed.

Where, in the case of a pre-settlement inam originally granted by a predecessor of the Zemindar, the inamdar was not disturbed until the enfranchisement of the inam by the Government, the inam must be deemed to have been continued within the meaning of Section 17 of Act II of 1894 and the enfranchisement by the Government will be valid.

Section 17, proviso 2 applies only to cases of registered proprietors and not to cases of pre-settlement inams.

G. Lakshmanna, P. Venkatramana Rao and *Y. Govindarajulu* for Appellant.

The Advocate-General for Respondent.

N. S.

The Chief Justice and Jackson, J. O.S.A. No. 13 of 1928.
13th December, 1928.

Civil Procedure Code, Order 21, *Rules* 16 *and* 53—*Assignment of decree—Subsequent attachment of the decree—If confers any rights.*

An attachment of a decree after it has been assigned by the decree-holder does not give any rights to the attaching decree-holder in the decree attached. Order 21, Rule 53 of the Civil Procedure Code is not self-contained and exhaustive and the omission to mention the assignee decree-holder in that Rule does not take away his rights under Order 21, Rule 16.

V. V. Srinivasa Aiyangar, A. V. Seshayya and *A. P. Sundarachariar* for Appellant.

Vere Mockett, K.S. Krishnaswami Aiyangar, G. Rajagopalan and *P. Thiruvengadaswami Mudaliar* for Respondent.

N. S.

The Chief Justice,
Madhavan Nair and
Jackson, JJ. Appeal Nos. 155 and 208 of 1923.
13th December, 1928.

Hindu Law—Adoption—Death of consenting sapinda—Adoption if invalidated.

An adoption made by a mother after the death of the son who gave her consent to adopt is not invalid on the ground that it was made after the death of the consenting sapinda. Test to be applied in such cases pointed out.

A. Krishnaswami Aiyar, B. Satyanarayana and *Y. Suryanarayana* for Appellant in Appeal No. 155 and 2nd respondent in Appeal No. 208 of 1923.

T. M. Krishnaswami Aiyar and *A. Venkatachalam* for 1st Respondent in Appeal No. 155 and Appellant in Appeal No. 208 of 1923.

P. Somasundaram for 2nd Respondent in Appeal No. 155 and 2nd respondent in Appeal No. 208 of 1923.

P. R. N.

Phillips and Odgers, JJ. C.M.P. Nos. 2847 to 2853 of 1928.
14th December, 1928.

Civil Procedure Code, S. 109—Final order—Order of remand.

Where a scheme suit under section 92 of the Civil Procedure Code was dismissed by the trial court on the preliminary ground that the temple was a private temple but, on appeal, this decision was reversed and the suit was remanded to the trial court for decision on the other issues,

Held, that this order of remand was not a final order within the meaning of section 109 of the Civil Procedure Code.

13 Mad. 349 followed.

43 M.L.J. 758 not approved.

T. M. Krishnaswami Aiyar for *K. P. M. Menon* and *K. P. Krishna Menon* for Petitioner.

The Advocate-General and *C. S. Swaminathan* for Respondent.

N. S.

Ramesam, Jackson and Reilly, JJ. S. A. No. 923 of 1925
20th December, 1928. and C. R. P. No. 991 of 1925.

Hindu Law—Joint family—Partition suit by son against father—Marriage expenses of plaintiff's sisters—Liability of plaintiff's share to be charged for—Origin of the rule.

Held, (Jackson, J., dissenting), that under the Hindu Law a son claiming partition from his father is liable to pay out of his share to be allotted on partition for the marriage expenses of his sisters who are unmarried at the time. Such liability is not cast solely on the father; where the father incurs expenses in respect of the marriage of a daughter pending the partition suit, such expenses also ought to be provided for in the decree to be passed in the suit. Distinction between the case of a daughter and a son's

daughter pointed out. Origin of the Hindu Law rule providing for the marriage expenses of daughters traced.

P. Satyanarayana for Appellant in S.A. No. 923 and C.R.P. No. 991 of 1925.

Ch. Raghava Rao for Respondent in S.A. No. 923 and Petitioner in C. R. P. No. 991 of 1925.

P. R. N.

The Chief Justice,
Odgers and Beasley, JJ. O.P. No. 202 of 1928.
21st December, 1928.

Income-tax Act (1922), *Ss.* 8, 10 *and* 60—*Government securities—Interest on investments in—Liability to income-tax.*

Where a Bank claimed exemption from income-tax in respect of interest on investments in Government securities by reason of the notification under S. 60 of the Income-tax Act exempting the profits of Co-operative Societies from such investments:

Held, that such investments did not form part of the business of the Bank, and that the interest or income from such investments was liable to income-tax as income from securities under S. 8 of the Income-tax Act.

M. Subbaroya Aiyar for Assessee.

M. Patanjali Sastri for Commissioner of Income-tax.
P. R. N.

Tiruvenkatachariar, J. C.R.P. No. 1679 of 1927.
21st December, 1928.

Indian Limitation Act, Ss. 20 *and* 21—*Promissory note—Part payment by one of the co-heirs of the maker—Saving of limitation for suit on the note against all the co-heirs.*

Part payment of the principal or of interest as such under a promissory note by any one of the co-heirs of the maker of the note will have limitation against all the heirs of the maker and not only against the person who makes the payment.

37 Cal. 461, 1927 All. 209 and 24 M.L.J. 66 followed.

14 I.C. 128 dissented from.

Case-law reviewed.

C. A. Seshagiri Sastri for Petitioner.

K. S. Desikan for Respondents.

Phillips and Tiruvenkatachari, JJ. C.M.A. No. 78 of 1926.
21st December, 1928.

Procedure—Appeal to High Court—Bench of two Judges—Difference in opinion—Result—Civil Procedure Code, S. 98*—Letters Patent, clause* 36.

The following question was referred to a Full Bench:—

"Where, in an appeal heard by a Bench of two Judges of the High Court, the Judges differ in opinion, whether the procedure applicable will be that provided by section 98 of the Civil Procedure Code or clause 36 of the Letters Patent."

T. M. Krishnaswami Aiyar and *P. Somasundaram* for Appellant.

K. S. Krishnaswami Aiyangar and *C. Rama Rao* for Respondents.

N.S.

Waller and Jackson, JJ.
10th January, 1929. S. A. No. 1448 of 1925.

Limitation Act, Art. 134*—Essentials for applicability.*

For the purpose of the applicability of Art. 134 of the Limitation Act it is sufficient that the transferee purchased under the belief that the full proprietory rights were transferred to him.

T. L. Venkatrama Aiyar for Appellant.

T. R. Ramachandra Aiyar and *M. Balasubramania Mudaliar* for Respondent.

N.S.

Venkatasubba Rao and Reilly, JJ. C.R.P. No. 698 of 1927.
11th January, 1929.

Negotiable Instruments Act, Ss. 29 *and* 120*—Promissory note by minor—Validity.*

Section 120 of the Negotiable Instruments Act must be read subject to section 29 and consequently a minor executant of a promissory note is not barred from raising the plea of minority in a suit upon the note.

M. N. Duraiswami Aiyangar for Petitioner.

L. S. Veeraraghava Aiyar for Respondent.

N.S.

Wallace and
Madhavan Nair, JJ. C. M. A. No. 347 of 1928.
16th January, 1929.

Civil Procedure Code, Order 21, Rule 66—Order by the Executing Court fixing a certain market value and upset price—If appealable.

An order by the Executing Court fixing the market value and upset price of the property to be sold and fixing the sale by lots under Order 21, Rule 66 of the Civil Procedure Code is not appealable.

27 Mad. 259 (F.B.) followed.

Cases reviewed.

K. S. Jayarama Aiyar for Appellant.

K. Bhashyam Aiyangar and *T. S. Subramania Aiyar* for Respondent.

N.S.

Madhavan Nair and
Jackson, JJ. C. M. P. No. 5352 of 1928.
16th January, 1929.

Civil Procedure Code, Sections 109 (*c*) *and* 110—*Suit decreed as regards some items and dismissed as to the rest—Appeal by defendant—Memo. of objections by plaintiff—Allowing of appeal and dismissal of memo. of objections—Application for leave to appeal by plaintiff—Decree of High Court whether one of variance or confirmance—Valuation of subject-matter of suit—Value given in the plaint—If and when can be re-opened—Interest accrued due subsequent to date of suit—If can be included—Construction of Will—If and when a substantial question of law—Special leave to appeal.*

Where a suit to recover various items of properties was decreed in respect of some of the items and dismissed as regards the rest, and the defendant preferred an appeal to the High Court as regards the items decreed and the plaintiff filed a memorandum of objections as regards the items disallowed to him, and the High Court allowed the appeal and dismissed the memo. of objections,

Held (on an application by the plaintiff for leave to appeal to the Privy Council), that the judgment of the High Court was a reversing judgment as the decree of the Lower Court was reversed as regards a number of items and the question involved in the appeal and the memo. of objections was a common question.

Held also that, in calculating the valuation of the subject-matter of the suit, the valuation given in the plaint by the applicant should be taken as final and the applicant cannot be allowed to re-open the same unless a *bona fide* mistake is established.

N R C

Held further that interest which has accrued subsequent to the date of the suit on the outstandings sought to be recovered in the plaint cannot be taken into account for the purpose of calculating the valuation of the subject-matter of the suit.

Where the construction relating to a Will is clear and the law relating thereto is well settled, the question as to the construction of the Will cannot be said to be a substantial question of law as to entitle a person to get special leave to appeal under Section 109 (*c*) of the Civil Procedure Code.

T. V. Venkatrama Aiyar, T. V. Ramanatha Aiyar and *P. S. Srinivasa Aiyangar* for Petitioner.

L. A. Govindaraghava Aiyar and *L. S. Veeraraghava Aiyar* for Respondent.

N.S.

The Chief Justice and Ananthakrishna Aiyar, J. — O. S. A. No. 109 of 1928.
18*th January,* 1929.

Civil Procedure Code, Order 21, *Rule* 89—*Amount to be paid to set aside sale—Enhanced rate of interest subsequent to sale proclamation agreed upon by the judgment-debtor—If should be paid.*

Under Order 21, Rule 89 of the C. P. Code, the only amount that should be paid to set aside the sale is the amount mentioned in the sale proclamation and the 5 per cent. ; any increased rate of interest subsequent to the sale proclamation agreed to be paid by the judgment-debtor need not be paid in order to entitle him to have the sale set aside.

K. S. Krishnaswami Aiyangar and *T. Krishnaswami Aiyangar* for Appellant.

A. Suryanarayaniah, V. C. Gopalratnam and *Mahomed Ibrahim Sahib* for Respondent.

N.S.

Wallace and Madhavan Nair, JJ. C.M.A. No. 37 of 1928.
15th January, 1929.

Civil Pro. Code, Ss. 2 (2), 11 *and* 47—*Mortgage decree—Execution—Application by purchaser of equity of redemption to be made a party—Time for filing counter by mortgagor refused—Application ordered—Subsequent petition by mortgagor that purchase benami for decree-holder—Dismissal of petition—Subsequent petition by mortgagor for non-recognition of the other person as purchaser—Amendment of prayer into a different one—Preliminary objection by decree-holder—Order overruling preliminary objection and deciding to hear the merits—If amounts to a decree—Appeal—Revision—Prior order—Finality and effect of—Constructive* res judicata—*Interference in revision—Breach of processual law.*

In the course of the execution of a mortgage decree an application was put in by a person alleging himself to be the purchaser of the equity of redemption to be made a party. The mortgagor who wanted to put in an objection requested for time to file a counter but it was refused and the application was ordered. Subsequently the mortgagor put in another application alleging that the purchase was really benami for the decree-holder but this also was dismissed. The mortgagor then put in another application for non-recognition of the other person as purchaser on the very same grounds as before and the prayer was subsequently amended to one for a declaration that as the purchase had been satisfied no execution should issue. A preliminary objection was raised that the mortgagor had no *locus standi* to put in this application and that the prior orders operated as *res judicata*. The Court overruled the preliminary objections and decided to dispose of the application on the merits. Against this order an appeal and a revision petition were preferred to the High Court by the decree-holder.

Held (1) that the appeal was not maintainable, as the order did not amount to a decree, being only an interlocutory order not disposing of the petition,

(2) that the prior orders passed on the mortgagor's petition for want of evidence were judicial orders and final, though the principle of constructive *res judicata* would not apply as the present prayer was different from the prayer in the previous petitions,

(3) that the High Court could interfere in revision as there had been a breach of the processual law.

T. Rangachariar and *B. C. Seshachala Aiyar* for appellant.

L. A. Govindaraghava Aiyar and *A. Ramachandra Aiyar* for respondent.

N.S.

N R C

Venkatasubba Rao and Reilly, JJ.
17th January, 1929.

C.M.A. Nos. 6 of 1925 and 310 to 312, 313 of 1925, C.R.P. Nos. 173 and 174 of 1925 and 628 and 627 of 1924.

Provincial Insolvency Act, Ss. 27 (2), 37 and 43—Scope of—Time fixed for discharge—Application to set aside alienation as fraudulent preference—Expiry of time fixed for discharge—Absence of application for extension of time—Order of annulment by Court—Power of Official Receiver to prosecute the petition for setting aside the alienation.

Section 43 does not operate so as to annul the adjudication automatically unless an order under the section is passed.

51 C. 337 referred to.

The Insolvency Court has jurisdiction to entertain an application for extension of time under section 27 (2) of the Act where the time originally fixed for discharge has expired.

17 C. 502 (P.C.) referred to.

Where no application for extension of time for discharge is put in either by the debtor or the creditor, the Court is not obliged to annul the adjudication unconditionally and when the Court annuls it, it should have regard to section 37; if an application to have an alienation set aside as a fraudulent preference is pending, the Court should not pass an unconditional order of annulment but must pass an order vesting the property in the Official Receiver under section 37.

Per *Venkatasubba Rao, J.*—Where a petition to have an alienation by an insolvent set aside as a fraudulent preference is pending and the Court passes an order of annulment, the Official Receiver in whom the property would be vested in section 37 can continue the prosecution of the petition.

Section 43 of the Act is controlled by the provisions of section 27 (2).

Per *Reilly, J.*—The word "shall" in section 43 of the Act is not equivalent to "may."

A. Krishnaswami Aiyar and *V. Govindarajachari* for appellant.

S. Srinivasa Aiyangar, B. Somayya, Kasturi Seshagiri Rao, M. Ranganatha Sastri, Court guardian and *V. Suryanarayana* for respondents.

N.S.

Ramesam and Jackson, JJ. A.S. Nos. 340 of 1924 and
21st January, 1929. 204 of 1925.

Contract Act, S. 263—Assignment by one of the partners of his share—Notice of assignment by the assignee to the partners—Subsequent settlement of accounts by the partners behind the back of the assignee—If binding on the assignee—Rate of conversion of dollars into rupees.

After the assignee from one of the partners of his share in the partnership business has given notice of the assignment to the partners, if the partners enter into a settlement of accounts behind the back of the assignee, it is not binding on the assignee, especially, if the valuation given to the inams in the settlement have not been arrived at by means of sale by public auction but the inams have been taken over by one of the partners.

The proper rate of conversion of dollars into rupees in the case of a claim by a partner or his assignee for his share in the partnership business carried on in the Federated Malay States is that prevailing on the date when the amount due to the plaintiff was ascertained and made known to him.

T. M. Krishnaswami Aiyar and *M. Subbaroya Aiyar* for appellant.

S. Varadachariar and *K. S. Venkataraman* for respondent.

N.S.

Venkatasubba Rao and Reilly, JJ. L.P.A. No. 12 of 1925.
21st January, 1929.

Mortgage—Usufructuary mortgage—Provision for payment of a certain amount to the mortgagor and the appropriation of the rest towards the mortgage—Purchase of the equity of redemption by another before the expiry of the period when mortgage would be discharged by the appropriation—Duty of mortgagee to appropriate the whole of the usufruct towards the mortgage—Words—Cowle—Meaning of.

An usufructuary mortgage was executed in 1865 under which the mortgagee was to pay, out of the yearly income of Rs. 240, Rs. 100 for Kattubadi, etc., appropriate Rs. 80 towards the loan and pay the balance of Rs. 60 to the mortgagor for his maintenance. In this way the entire mortgage would be wiped off in 55 years. In 1882 the equity of redemption was purchased by a third person in execution of a money decree against the mortgagor and he brought a suit for possession of the properties against the mortgagee in 1913 before the expiry of the 55 years. The defendant pleaded that the transaction evidenced by the document was a lease and not a mortgage as the word "Cowle" was used and that in any event the plain-

tiff was not entitled to ask the defendant to appropriate the sum of Rs. 60 payable to the mortgagor also towards the mortgage.

Held (1) that the word "Cowle" generally meant an agreement or a contract and was not restricted to denoting a lease only and that the transaction was a usufructuary mortgage and not a lease.

(2) that the term in the document providing for the payment of Rs. 60 to the mortgagor was not an independent covenant enforceable otherwise than as a term in the mortgage and cannot be treated as a personal allowance in favour of the mortgagor and therefore the plaintiff was entitled to call upon the defendant to appropriate this sum of Rs. 60 in redemption of the mortgage debt after the date of his purchase.

G. Lakshmanna and *M. Appalacharya* for appellants.

S. Varadachariar, P. Somasundaram and *N. Rama Rao* for respondent.

N.S.

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*Odgers and Wallace, JJ.** S.A. No. 257 of 1925.
25th January, 1929.

Limitation Act, Art. 47—Possession proceedings between manager of a joint family and another—Order thereon—If binds the other members of the family.

Where a Hindu father acted as manager of a joint Hindu family in proceedings under section 145 of the Criminal Procedure Code, and the other members of the family, though they were not parties to those proceedings, were aware of the proceedings.

Held, that the order in those proceedings would be binding not only on the father but also on the other members of the family and therefore a suit by any member of the family to recover possession of the properties would be governed by Art. 47 of the Limitation Act.

The Advocate-General and *V. Govindarajachariar* for appellant.

S. Varadachariar, A. Satyanarayana, P. Somasundaram, S. Narayana Aiyangar and *B. V. Ramanarasu* for respondent.

N.S.

Phillips and Madhavan Nair, JJ. A.S. No. 211 of 1926.
25th January, 1929.

Hindu Law—Joint family—Partition suit by father along with his minor son against his own father and step-brother—Death of grandfather subsequent to suit—Right of minor sons to plead that the partition as regards his share should not be ordered.

A suit for partition was filed by a person along with his minor sons against his father and step-brother. The grandfather died subsequent to the suit and the minor son contended that he would be entitled to a larger share due to the death of the grandfather and therefore it was not to his interest that he should be treated as having become divided in status from the date of the institution of the suits.

Held, that a person can withdraw the declaration of his intentive made in the plaint and in the case of a minor, if the Court found that it was detrimental to the interests of the minor for the partition suit to be proceeded with, the Court is entitled to disregard the plaint for partition filed on his behalf, and that as the declaration of his intention to be divided was not carried into effect by the passing of a decree there was nothing to prevent the minor from withdrawing his plaint for partition and the Court would give effect to it, if it was of opinion that it would be prejudicial to the interests of the minor by continuing the suits.

T. M. Krishnasami Aiyar for appellant.

T. R. Ramachandra Aiyar, B. Sitarama Row, S. R. Muthusami Aiyar, R. Kesava Rao and *V. Ramasami Aiyar* for respondent.

N.S.

Ramesam and Jackson, JJ. A.S. No. 33 to 36 of 1926.
29th January, 1929.

Limitation Act, Art. 134*—Valuable consideration—Mere reservation of rent—Transfer of Property Act, S.* 51*—Applicability to permanent leases.*

A mere reservation of rent in a permanent lease deed is not a valuable consideration within the meaning of Art. 134 of the Limitation Act.

44 Mad. 831 referred to.

Section 51 of the Transfer of Property is applicable in the case of permanent lease.

P. R. Ganapathi Aiyar and *A. Venkatachellam* for appellant.

G. Lakshmanna and *B. T. M. Raghavachari* for respondent.

N.S.

N R C

Ramesam and Jackson, JJ.
31st January, 1929.

A.S. Nos. 186 of 1923 and 76, 77 and 106 of 1926.

Mahomedan Law—Religious Endowment—Durga—Appointment of Mutawalli—Intentions of founder—Meaning of words "batuam bad batuam" *and* "naslam bad naslam"*—Descendants of daughters whether members of the family—Right of women to succeed.*

On a question of appointment to the mutawalli office in a Mahomedan *durga* the intentions of the founder may be considered by the Court, but subject to this there is no absolute right to the office in any particular member of the family.

34 Cal. 118 (P.C.), 43 Cal. 467 and 38 Mad. 491 relied on.

The words *"batuam bad batuam"* and *"naslam bad naslam"* mean generation after generation. Those words may exclude cognates in the case of private grants but the same consequence does not follow where they occur in documents dealing with managership of wakfs. There the words should be taken literally so as to include daughter's sons. The descendants of females are also members of the family and heirs under the Mahomedan Law and may consequently be appointed to the office of mutawalli.

10 Bom. H. C. R. 7; 16 W. R. 193 not followed.

In the case of succession to the Mutawalli office women are not necessarily excluded but they will not generally be appointed where a competent male member of the family is available.

T. R. Venkatarama Sastri and *B. V. Viswanatha Aiyar* for appellant in A.S. No. 186 of 1923.

A. Viswanatha Aiyar and *A. Ramaswami Aiyar* for appellant in A.S. No. 76 of 1926.

L. A. Govindaraghava Aiyar for appellant in A.S. No. 77 of 1926.

T. Rangachariar and *K. S. Sankara Aiyar* for appellant in A.S. No. 106 of 1926.

B. Sitarama Rao and *N. Swaminatha Aiyar* for 2nd respondent.

S. Varadachariar, K. Narasimha Aiyangar and *Mahomed Kabir Khan* for 10th respondent.

B. Pocker for 8th and 9th respondents.

N.S.

Phillips and Wallace, JJ. C. M. A. No. 241 of 1927.
1st February, 1929.

Civil Procedure Code, Order 13, *Rule* 4—*"Admitted in evidence"—Meaning of—Mere affixture of initials of judicial officer with a facsimile of rubber stamp—If amounts to admission of the document.*

Where, in a suit on a hundi, the hundi was marked as an exhibit with the usual endorsement "admitted in evidence", and the facsimile initials of the District Munsif was also affixed on the document, but the document was subsequently rejected for non-cancellation of the stamp,

Held, (1) that such rejection was legal, as the words "admitted in evidence" in Order 13, Rule 4 of the Civil Procedure Code meant "letting the document in" as a result of the judicial determination of the question and not a mere mechanical admission; and (2) that affixture of the facsimile rubber stamp initials of the District Munsif was not a proper compliance with the provisions of Order 13, Rule 4, Civil Procedure Code.

Case-law discussed.

12 Bom. L. R. 466 : 6 I. C. 903 followed.

12 M. L. J. 351 distinguished.

Ch. Raghava Rao for Appellant.

P. Somasundaram for respondent.

N.S.

Ramesam and Jackson, JJ. A. S. Nos. 244 and 245 of 1922.
1st February, 1929.

Inam—Pre-settlement inam—Karnam's service inams—Public or private service inam—Presumption—Power of Government to abolish the service and resume the inam—Madras Permanent Settlement Regulation—Instrument of Instructions prepared before the Regulation—Admissibility.

A karnam's office is a public office and karnam service inams are public service inams and not private service inams.

In the case of pre-settlement inams, no inference can be drawn in favour of the inclusion of public service inams in the assets of the zemindari. In the case of such inams, the Government has power to continue or abolish at their pleasure any of the village public offices.

Instrument of Instructions prepared before the Madras Permanent Settlement Regulation was passed are not admissible in evidence in construing the Regulation.

N R C

The Government Pleader for Appellant.

The Advocate-General, A Venkatachalam and *P. Satyanarayana Rao* for Respondent.

N.S.

The Chief Justice and Jackson, J. O. S. A. No. 30 of 1928.
7th February, 1929.

Indian Companies Act—Fund incorporated under the Act—Share fixed at Rs. 100 *payable at one rupee per month for 7 years —Provision for sharcholder ceasing to be such after 7 years—If* ultra vires.

Where the Articles of Association of a Fund incorporated under the Indian Companies Act provided that its share capital fixed at Rs. 100 per share was payable in monthly instalment of Re. 1 for seven years and that thereafter his name would be taken from the registry of shares and he would cease to be a shareholder,

Held, that such a provision was *ultra vires* of the Memorandum of Association and the principles embodied in the Indian Companies Act and would amount to a reduction of the capital which would not be legal without the order of Court.

O. T. G. Nambiar instructed by *Messrs. King & Partridge* for Liquidator.

S. Duraiswami Aiyar, T. K. Rangaswami Aiyar, K. B. Ranganatha Aiyar, T. P. Kalyanaraman, A V. Seshayya, S. Rangachari and *K. Kuppuswami* for Contributories.

N.S.

The Chief Justice and Ananthakrishna Aiyar, J. O. S. A. No. 35 of 1927.
12*th February,* 1929.

Madras District Municipalities Act (*V of* 1920), *Section* 81—*Railway Company—Liability to property tax—Notification by Government of India specifying categories of taxes but not the rates—If* ultra vires.

The Madras and Southern Mahratta Railway Company is not liable to property tax under the Madras District Municipalities Act of 1920.

The notification issued by the Government of India in 1911 specifying the various categories of taxes to be levied by the Municipal Council against Railway Companies is *ultra vires* of the powers of the Government of India, as it did not make any reference to the sections of the Municipalities Act in which rates of tax were mentioned.

C. Sambasiva Rao for *T. R. Arunachalam* for Appellant.

R. N. Aingar instructed by *Messrs. King & Partridge* for Respondent.

N.S.

Ramesam and Jackson, JJ. A. S. No. 218 of 1927.
12th February, 1929.

Pleader and client—Gift by client to pleader—When valid.

A gift by a client to his pleader, while such relationship subsists, is invalid unless the pleader is in a position to show beyond all possible doubt that the client had independent advice and was not influenced in the slightest degree by the relationship.

The Advocate-General and *V. Govindarajachari* for Appellant.

S. Varadachariar for *S. V. Venugopalachariar* for Respondent.

N.S.

The Chief Justice, Odgers and Beasley, JJ. O. P. No. 152 of 1928.
15th February, 1929.

Income-tax Act (1922), *Sections* 2 (4) *and* 4 (2)—*"Business"—Growing, cultivating and manufacturing tea outside British India, if—Income from such operations, if assessable to income-tax.*

Where the assessee who owned a tea estate outside British India was carrying on the occupation of growing and cultivating tea on land and converting the green leaves into tea, and the income derived from such occupation was assessed to income-tax under Section 4 (2) of the Income-tax Act and the assessee contended that the income from the operations of growing and cultivating tea was agricultural income and as such exempt from income-tax,

Held, that the growing, cultivating and manufacturing tea constituted business under Section 2 (4) of the Income-tax Act, and that the income from such operations was taxable under Section 4 (2) of the Act.

A. Krishnaswami Aiyar, M. Subbaroya Aiyar and *V. S. Venkatarama Aiyar* for Assessee.

M. Patanjali Sastri for Commissioner of Income-tax.

N.S.

The Chief Justice, Odgers and Beasley, JJ. O.P. No. 134 of 1928
18th February, 1929.

Income-tax Act, Ss. 10 *and* 60—*Mutual Benefit Society—Meaning of—Co-operative Society purchasing and distributing produce to shareholders and paying devidend to members—If one carrying on business—Assessability to income-tax.*

Where a Co-operative Society which was incorporated in England under the English Industrial and Provident Societies Act of 1893, but not registered as a Co-operative Society in India under

section 60 of the Income-tax Act, the object of the Company being to distribute tea and other articles to the shareholders at a cheap price, and the Company grew and purchased produce and distributed them to its shareholders only,

Held, that the Company was a mutual benefit society and that the income derived by the Company was not assessable to income-tax.

M. Patanjali Sastri for Commissioner of Income-tax.

Nugent Grant instructed by *Messrs. King & Partridge* for Assessees.

P.R.N.

Kumaraswami Sastri, Ramesam and Reilly, JJ.
19*th February,* 1929.

C.M.A. Nos. 155 and 403 of 1926.

Civil Procedure Code, S. 98 *and Letters Patent* (*Madras*), *cl.* 36 *—Applicability and scope—High Court Appeals—Difference of opinion among Judges—Procedure.*

Held, the procedure to be applied in the case of an equal division of opinion among Judges in all classes of appeals in the High Court is that laid down in clause 36 of the Letters Patent; and cl. 36 applies whether or not the appeal is from the Original Side of the High Court.

T. M. Krishnaswami Aiyar and *P. Somasundaram* for Appellant.

K. S. Krishnaswami Aiyangar and *C. Rama Rao* for Respondent.

P.R.N.

Kumaraswami Sastri and Ramesam, JJ.
19*th February,* 1929.

C.M.P. No. 3509 of 1928.

Civil Procedure Code, S. 110*—Substantial question of law—Question of* res judicata.

Where two Courts have held that a suit is not barred by *res judicata,* it does not amount to a substantial question of law within the meaning of S. 110 of the Civil Procedure Code.

B. Somayya for Petitioner.

Ch. Raghava Rao, E. Krishnamurthi, A. Sundaram Aiyar and *V. K. Ramachandra Aiyar* for Respondents.

N.S.

Phillips and Reilly, JJ.
21*st February,* 1929.

O.S.A. No. 71 of 1928.

Madras City Municipal Act—License Fee in respect of storage of foreign liquor—Increase by 800 *per cent.—Legality.*

Where the Corporation of Madras increased the license fee payable by Messrs. Spencer & Co. in respect of storage of foreign liquor from Rs. 25 to Rs. 200,

Held, that the power to collect the license fee was not the power of taxation under the Municipal Act as defined in Part III, Chapter V and that the sudden increase of the license fee by 800 per cent. should not be said to be a reasonable one and, therefore, was *ultra vires* of the powers of the Corporation.

S. Rangasami Aiyangar for Appellant.

Vere Mockett instructed by *Messrs. Short Bewes & Co.* for Respondent.

N.S.

Odgers, J. Cr.M.P. No. 791 of 1928.
22nd February, 1929.

Abkari Act—Complaint by a private individual—If entertainable.

Under the Abkari Act only a Collector or a Commissioner or a person authorised by the Local Government can proceed against persons who are alleged to have committed offences under the Act. No private person can file a complaint.

K. S. Jayarama Aiyar for Accused.

K. Venkataraghavachari for The Public Prosecutor.

N.S.

Waller and Krishna Pandalay, JJ. Cr.R.C. No. 914 of 1928.
25th February, 1929.

Madras Local Boards Act, Ss. 184 *and* 221*—Power of Union Board to provide for motor stand and levy a fee therefor—Power of Magistrate to decide about the legality of the fee.*

A Magistrate has got power to decide whether the levy of a fee by a Union Board for motor stand is *ultra vires* or not.

A Union Board as such has no power to levy a fee for a motor bus stand as distinguished from an ordinary stand for country carts. The bus stand cannot come under the term "public halting place" mentioned in S. 184 of the Local Boards Act.

S. Panchapakesa Sastri for Petitioner.

The Public Prosecutor for the Crown.

N.S.

The Chief Justice, Wallace and L.P.A. No. 312 of 1927.
Ananthakrishna Aiyar, JJ.
25th February, 1929.

Civil Procedure Code, S. 73 *and O.* 21, *R.* 11*—Construction—Rateable distribution—Conditions for granting of—Execution appli-*

cation not in strict conformance with O. 21, *R.* 11—*If disentitles applicant from sharing in the assets.*

Where in execution of a decree the appellant applied for attachment of a fund in Court standing to the credit of the respondent who had also filed a suit against the same judgment-debtor, and the Court ordered the attachment though the application was not in conformity with O. 21, R. 11, Civil Procedure Code, and the Court holding that there was no valid execution application, did not allow rateable distribution to the appellant under S. 73, Civil Procedure Code

Held, that the appellant having applied for execution of his decree before the receipt of assets as laid down in S. 73, Civil Procedure Code, it should not be said that there was no execution application, it having been acted upon by the Court though certain informal particulars were not complied with, and that the appellant was entitled to share rateably in the fund attached.

T. Krishnaswami Aiyangar for Appellant.

P.R.N.

Phillips and Reilly, JJ. A.S. No. 269 of 1926
26th February, 1929.

Hindu Law—Widow—Alienation—Consent of reversioner—Three reversioners—Consent of one—Effect.

The consent of even one of several reversioners to an alienation by a Hindu widow can raise the presumption of necessity for the alienation.

P. Venkataramana Rao for Appellant.

S. Varadachariar, V. Govindarajachari, M. Appalachari and *J. Lakshmayya* for Respondents.

N.S.

Venkatasubba Rao, J. S.A. No. 1506 of 1928.
26th February, 1929.

Madras Local Boards Act—Election for membership of Taluk Board—Nomination of more than one candidate by one person—Nomination of the same candidate by the same person twice—Legality—Rejection of nomination paper by Chairman—Suit for declaration that nomination paper valid and for injunction—Maintainability.

The spirit underlying the election rules framed under the Madras Local Boards Act is that one voter should not nominate more candidates than there are vacancies and not that he should not subscribe to several nomination papers of the same candidate.

A suit for a declaration that a nomination paper is valid and was wrongly rejected by the Chairman and for an injunction restraining the Chairman from holding an election without the plaintiff as a candidate is maintainable.

P. Venkataramana Rao and *A. Lakshmayya* for Appellant.

Ch. Raghava Rao and *D. Krishnaswami* for 1st and 2nd Respondents.

N.S.

Kumaraswami Sastri, Ramesam and Reilly, JJ. L.P.A. No. 202 of 1925.
26th February, 1929.

Letters Patent (Madras), Amended cl. 36—If retrospective.

Held, by the Full Bench, that the amended clause 36 of the Letters Patent (Madras) was retrospective in operation and applied to all appeals pending in the High Court at the time when the amended clause came into force.

The Advocate-General and *K. Balasubramania Aiyar* for Appellant.

K. V. Krishnaswami Aiyar, T. S. Ramaswami Aiyar and *V. Sundaram Aiyar* for Respondent.

P.R.N.

The Chief Justice and Ananthakrishna Aiyar, J. L.P.A. No. 229 of 1925.
27th February, 1929.

Madras Civil Courts Act, S. 11*—Power of District Judge to allocate work to Additional Courts—Notification that Additional Court has no power to execute decree—Effect.*

Where an Additional Munsif Court was constituted by a notification of a High Court and was given jurisdiction to dispose of such suits and applications as were transferred to it by order of

the District Judge, and a suit was decreed by the Additional Court but the decree-holder applied for execution to the Principal Court relying on a notification of the District Judge,

Held, that the District Judge was empowered to issue such a notification by virtue of the notification of the High Court and S. 11 of the Civil Courts Act and therefore the execution application made to the Principal Court was one made to a proper Court and would save litigation.

C. S. Venkatachariar and *H. Suryanarayana* for Appellant.

K. Bhashyam Aiyangar and *B. Jagannadha Doss* for Respondents.

N.S.

The Chief Justice and Ananthakrishna Aiyar, J. L.P.A. No. 275 of 1925.
28th February, 1929.

Practice—Second Appeal—Interference in with finding of fact —Justifiability.

Where, in a suit for damages for wrongful dismissal from service, the District Judge on appeal held that the plaintiff had been wrongfully dismissed, and in Second Appeal to the High Court, the learned Judge sitting in Second Appeal reversed that finding on the ground that there was not sufficient evidence to support the finding:

Held, on Letters Patent Appeal, that the finding of the District Judge about the wrongful dismissal of the plaintiff, being a question of fact, the High Court was not justified in Second Appeal in going into the evidence to see if the finding was correct or not, however unsatisfactory the finding might be, and that the order reversing the District Judge's decision ought to be set aside.

T. R. Ramachandra Aiyar and *N. A. Krishna Aiyar* for Appellant.

K. Bhashyam Aiyangar and *T. S. Srinivasa Aiyar* for Respondent.

P.R.N.

Kumaraswami Sastri, J. Application No. 296 of 1929.
4th March, 1929.

Civil Procedure Code, O. 33, *R.* 1—*Suit in* forma pauperis *by the Official Assignee—Maintainability.*

The Official Assignee can institute a suit in *forma pauperis;* the fact that he has property in one capacity does not preclude him from instituting the suit in another capacity.

V. Varadaraja Mudaliar for Official Assignee.

N.S.

Phillips and Reilly, JJ. A.S. No. 428 of 1922.
4th March, 1929.

Jurisdiction—British Indian Court—Suit for declaration that adoption of French subject by another French subject is not valid—Certain properties of the adopted son situated in British India—Maintainability of suit.

Where a suit was brought in a British Indian Court for a declaration that an adoption of a French subject by another French subject is invalid and it appeared that certain of the properties to which the alleged adopted son could lay claim were situated within British India,

Held, that the suit was not maintainable and should be dismissed, as the determination of the question relating to adoption stood on the same footing as that of a person's legitimacy and was a question of status.

The Advocate-General, B. Satyanarayana and *C. Rama Rao* for Appellant.

L. A. Govindaraghava Aiyar and *A. Ramachandra Aiyar* for Respondents.

N.S.

Phillips and Krishna Pandalay, JJ. C.M.A. No. 418 of 1927.
6th March, 1929.

Mortgage—Construction—"Ayavesu"—Meaning of.

Where a mortgage deed provided for discharge of the mortgage debt by sale of the mortgage lands and from the *Ayavesu,* and, the sale of the mortgage properties being insufficient to discharge the mortgage amount in full, the decree-holder applied for attachments of certain rent decrees obtained by the purchaser of the mortgaged lands against the tenants in possession,

Held, that the mortgage deed having created a charge over the future produce as well, the charge fastened itself on the substituted security, namely, the rent decrees and therefore the attachment was proper and valid.

N R C

T. M. Krishnaswami Aiyar for *The Advocate-General* and *V. Pattabhirama Sastri* for Appellant.

B. Satyanarayana for Respondents.

N.S.

Odgers, J. Cr.M.P. No. 129 of 1929.
7th March, 1929.

Contempt proceedings—Jurisdiction of High Court to award costs.

The High Court has inherent jurisdiction to award costs in contempt proceedings.

T. R. Ramachandra Aiyar for *C. Narasimhachari* for Petitioner.

Nugent Grant for *J. A. Pinto* for Respondent.

N.S.

Waller and Anantakrishna Aiyar, JJ. Cr.A. No. 707 of 1928
11th March, 1929.

Penal Code, S. 149—*Offence—If includes an offence under the Railways Act.*

The term "offence" in S. 149, Indian Penal Code, does not comprise an offence under the Railways Act.

20 L.W. 914 referred to.

V. L. Ethiraj and *D. Ramaswami Aiyangar* for Accused.

K. N. Ganapathi for The Public Prosecutor.

N.S.

Waller and Anantakrishna Aiyar, JJ. Cr.R.C. No. 34 of 1929.
12th March, 1929.

Criminal Procedure Code, S. 195—*Public servant charged with offence—Sanction to prosecute—If necessary.*

A public servant charged with an offence committed while purporting to act in the discharge of his official duty cannot be prosecuted without sanction to prosecute.

52 M.L.J. 647 and 56 M.L.J. 293 not followed.

9 M. 437 followed.

B. T. M. Raghavachari for Accused.

The Public Prosecutor for the Crown.

Ch. Raghava Rao for Complainant.

N.S.

The Chief Justice, O.S.A. No. 26 of 1928
Odgers and Beasley, JJ.
12th March, 1929.

Presidency Towns Insolvency Act, Ss. 7 and 36 (Amended)—Insolvency Court—Jurisdiction to decide liability of garnishee—Discretion.

Where the Official Assignee applied to the Court for the issue of a summons to a garnishee of the insolvent, and the garnishee appeared and admitted a portion of the sum claimed, but denied his liability with regard to the rest, and the Court ordered the garnishee to pay the admitted sum into Court, leaving the Official Assignee to institute a separate suit in respect of the portion of the debt denied by the garnishee,

Held, that it was in the discretion of the Insolvency Court to decide or not the liability of the garnishee, that no hard and fast rule can be laid down and that each case must be considered with respect to the circumstances arising in it.

Held, further, that it not having been shown that the discretion was not properly exercised, the decision should not be interfered with in appeal.

Nugent Grant instructed by *V. Varadaraja Mudaliar* for Appellant.

R. N. Aingar for Respondent.

P.R.N.

The Chief Justice, Wallace O.S.A. No. 92 of 1927.
and Anantakrishna Aiyar, JJ.
12th March, 1929.

Civil Procedure Code, O. 21, R. 50 and O. 30, Rr. 3 and 4—Partnership—Suit and decree against firm in the name of the firm—Partner dying prior to suit—Separate estate of—Liability to be proceeded against in execution.

A decree against a firm in the name of the firm as such cannot be executed against the separate property of a partner who was dead at the time of the institution of the suit in which such decree was passed.

P. Viswanatha Aiyar for Appellant.

G. Krishnaswami Aiyar and *T. R. Sreenivas Aiyar* for Respondent.

P.R.N.

The Chief Justice, Wallace and Anantakrishna Aiyar, JJ.
15*th March*, 1929.

C.R.P. No. 633 of 1928

District Municipalities Act, S. 51—*Applicability—Election of person disqualified under S.* 49 (2)—*Remedy of aggrieved person.*

S. 51 of the District Municipalities Act only applies to cases where the election has become complete and a voter is not prevented from questioning or objecting to the election of a person disqualified under S. 49 (2) at the time of the nomination on the ground that he was so disqualified.

T. M. Krishnaswami Aiyar and *T. E. Ramabadhrachariar* for Petitioner.

K. Bhashyam Aiyangar and *V. C. Veeraraghavan* for Respondent.

P.R.N.

The Chief Justice and
Anantakrishna Aiyar, J.
15th March, 1929.

O.S.A. No. 24 of 1928.

Contract Act, S. 23—Agreement to pay money in return for offering puja to God for success in the suit—If opposed to public policy.

An agreement executed by a person promising to pay a certain amount in consideration of the other person offering puja to God and praying for the success of the executant in a suit filed by him is not illegal or opposed to public policy.

49 All. 705 distinguished.

R. Swaminatha Aiyar for Appellant.

K. Narasimha Aiyar for Respondent.

N.S.

The Chief Justice and
Anantakrishna Aiyar, J.
15th March, 1929.

O.S.A. No. 82 of 1927.

Trust—Trustee utilising trust moneys in his own private business—Right of beneficiary to claim a charge in respect of those moneys.

Where one of several trustees utilised the money belonging to the trust in his own business and was subsequently adjudicated an insolvent,

Held, that the other trustees were entitled to priority over other creditors of the insolvent in respect of the trust amount and would be entitled to a charge over the assets of the insolvent.

Principles of following the trust property discussed.

S. Duraswami Aiyar instructed by *V. Varadaraja Mudaliar* for Appellant.

Satagopa Mudaliar for Respondent.

V. V. Srinivasa Aiyangar, N. Rajagopala Aiyangar and *S. G.*

N.S.

Phillips and Reilly, JJ.
18th March, 1929.

A.S. No. 148 of 1926.

Religious Endowment—Temple—Land taken by the trustee on permanent cowle—Alienation—Absence of necessity—Validity of the alienation.

Where certain sites were acquired by the trustees of a temple on permanent cowle for purposes connected with the temple and for building houses and subsequently the land was sold at a very high price,

Held, that the sites could not be said to have been dedicated to the trust in the sense that the property was given to the temple

for its maintenance or upkeep and that, though there was no necessity for the alienation, still, having regard to the terms of the original acquisition and the high price realised by the sale, the alienation must be upheld.

The Advocate-General and *M. Venkatasubbiah* for Appellant.

S. Varadachariar and *K. S. Venkatarama Aiyar* for Respondent.

N.S.

Wallace, J. C.M.S.A. No. 39 of 1925.
20th March, 1929.

Civil Procedure Code, S. 47 *and O.* 21, *R.* 2—*Mortgage suit—Preliminary decree against two out of five defendants only—Satisfaction of decree entered on application of the other three defendants—Prior attachment of decree by another person—Application by the three defendants under O.* 21, *R.* 2 *to stop execution—Maintainability.*

A preliminary decree was passed in a mortgage suit against two only out of five defendants. Subsequently the other three defendants alleging satisfaction of the decree applied to the Court to have it recorded and the same was done. Prior to this, the mortgage decree was attached by a person who had obtained a decree against the decree-holder and at his instance the record of satisfaction was set aside. Thereupon, the attaching decree-holder obtained a final decree and sought to execute it. The defendants who had previously applied for recording satisfaction put in an application alleging that the decree had been satisfied and execution ought not to issue.

Held, that the particular defendants who had put in the application could not be said to be the judgment-debtors as the decree directed payment of the money only by the other defendants, and, consequently, they had no *locus standi* to put in application under O. 21, R. 2, Civil Procedure Code; but, as they were parties to the suit and had not been exonerated, and as the attaching decree-holder was the representative of the original decree-holder and as the question whether the decree passed in the suit was executable or not was one relating to the execution of the decree, the question of the alleged satisfaction of the decree must be decided by the executing Court.

B. Jagannada Doss for Appellant.

D. Ramaswami Aiyangar for *H. Suryanarayana* for Respondents.

N.S.

Waller and Krishna Pandalai, JJ. C.C.C.A. No. 5 of 1927.
18*th March*, 1929.

Contract Act, S. 178—*Possession—Distinction from custody—Possession of canvasser for sale of goods—Pledge by such person—Validity.*

A person who acts only as a canvasser for the sale of a jewel has only custody of the jewel and not "possession" as defined in S. 178 of the Contract Act and consequently a pledge of the jewel by him is invalid and does not enable the pledgee to get a good title.

K. S. Krishnaswami Aiyangar and *V. Radhakrishnayya* for Appellant.

K. Bhashyam Aiyangar for *S. S. Sankara Mudaliar* for Respondent.

N.S.

The Chief Justice, Beasley and Waller, JJ. C.M.A. No. 369 of 1928.
25*th March*, 1929.

Workmen's Compensation Act, S. 2 (1) (*n*) *and Sch. II, cl.* (*v*)—*Construction—Workman employed in loading ship—Meaning—Cooly employed in carrying goods from warehouse to quay—Right of to compensation.*

Where a cooly who was employed to carry goods from a warehouse within the harbour about a quarter of mile distant from the quay, to the ship for loading was injured at the godown and the Commissioner of Labour awarded him compensation:

Held, that the cooly was not a workman within the meaning of S. 2 (1) (*n*) and Sch. II, cl. (*v*) of the Workmen's Compensation Act, and that he was not entitled to any compensation under the Act for injuries received in the course of his employment, as the Act requires that the warehouse or godown from which the goods are taken must be one by the side of the ship from which the goods must be directly loaded on to the ship.

Nugent Grant instructed by *King & Partridge* for Appellants.

K. V. Krishnaswami Aiyar and *K. V. Sesha Aiyangar* for Respondent.

P.R.N.

The Chief Justice, Odgers and Wallace, JJ. O.P. No. 115 of 1928.
26*th March*, 1929.

Income-tax Act, S. 4 (1)—*Construction—"Received in British India"—Meaning of—Foreign Railway Company for construction of railway line in French India—Line constructed and managed by Railway Company working in British India and pay-*

ment of profits in British India—Amount paid to foreign Company—Assessability to income-tax.

A Railway Company, to wit the Pondicherry Railway Company, incorporated in England was formed for the purpose of constructing a railway in Pondicherry, French India. The construction, management and running of the line was entrusted to the South Indian Railway Company having its office in British India and under the terms of the agreement, the latter Company was given absolute control, the latter Company's officers were to be officers of the foreign Company and the earnings were to be paid at the office in British India.

On a question arising as to the assessability of such earnings paid to the Pondicherry Railway Company:

Held, by Odgers and Beasley, JJ. (The Chief Justice dissenting), that, though the earnings paid to the foreign Company were in respect of operations outside British India, there was a receipt of the profits in British India, and that they are assessable to income-tax under S. 4 (1) of the Income-tax Act.

The Advocate-General instructed by *King & Partridge* for Assessee.

M. Patanjali Sastri for Commissioner of Income-tax.

P.R.N.

Kumaraswami Sastri,
Odgers and Wallace, JJ.
26th March, 1929.

O.P. Nos. 127 and 217 of 1928.

Indian Income-tax Act, Ss. 4 (2) *and* 26—*Applicability—Business of joint Hindu family carried outside British India—Allotment at partition to one member—Receipt of profits in British India prior to and after partition—Assessability to income-tax.*

Held, that S. 26 of the Indian Income-tax Act governs the case of a Hindu co-parcener getting a business allotted to him at partition. Where the entire business of the joint family outside British India was given to the assessee at partition and the assessee conducted the same without closing the old account and starting new accounts, the profits made by the family were profits in the hands of the assessee; but that the liability was confined to the profits received by the family or assessee after partition.

K. S. Krishnaswami Aiyangar and *P. R. Srinivasa Aiyangar* for Assessee.

M. Patanjali Sastri for Commissioner of Income-tax.

P.R.N.

Odgers and Wallace, JJ.
26th March, 1929.

App. No. 349 of 1924.

Civil Procedure Code, S. 13 (*b*)—*Suit on a mortgage in a foreign Court—Service of defendant by substituted service—Affi-*

davit by plaintiff giving details of his claim—Non-appearance of the defendant—Decree in favour of the plaintiff—If can be said to be given on the merits of the case.

A suit was filed on a mortgage bond in the District Court of Colombo and the defendant was served by substituted service. The plaintiff filed an affidavit detailing his claim and, the defendant not appearing, a decree was passed in favour of the plaintiff. The plaintiff instituted a suit on this foreign judgment.

Held, that the judgment of the foreign Court was not one given on the merits of the case within the meaning of S. 13, cl. (*b*) of the Civil Procedure Code.

Case-law reviewed.

T. M. Ramaswami Aiyar for Appellant.

V. Rajagopala Aiyar, S. Jagadisa Aiyar and *T. V. Ramiah* for Respondent.

N.S.

Phillips and Reilly, JJ. A. S. No. 248 of 1924.
28th March, 1929.

Partnership—Promissory note executed by one of the partners—Suit on—Liability of the other partners—Decree if can be given on the original cause of action.

Where a promissory note was executed by a person who was one of several partners in the partnership and there was no mention of the partnership in the promissory note nor was the executant mentioned in the note as representing the other partners,

Held, that the other partners could not be made liable on the promissory note, although the amount borrowed under the note was utilised for the purpose of the partnership business.

Held also, that a party will not be entitled to sue on the original cause of action in such a case unless the plaint is framed alternatively.

T. R. Ramachandra Aiyar and *S. Srinivasa Aiyar* for Appellant.

S. Varadachariar for Respondent.

N.S.

Phillips and Reilly, JJ. App. No. 395 of 1924.
4th April, 1929.

Hindu Law—Minor co-parcener—Manager entering into partnership with another—Minor if entitled to the benefits of the partnership—Minor when can be said to be admitted to the benefits of the partnership.

A Hindu joint family *qua* joint family cannot be treated as a member in a partnership business. Consequently where a Hindu father entered into a partnership with a stranger he alone must be

deemed to be the partner and not the minor members of the joint family.

A minor member of the joint family cannot be deemed to have been admitted to the benefits of the partnership for the purpose of making him a partner unless some authorised person acting on behalf of the minor consented to the same.

C. S. Venkatachariar and *S. Venkatesa Aiyangar* for Appellant.

The Advocate-General and *M. Patanjali Sastri* for Respondents.

N.S.

Wallace and Walsh, JJ. C.M.A. No. 459 of 1928.
5*th April*, 1929.

Civil Procedure Code, O. 39, R. 4—Order of injunction—Varying of—Grounds for.

Under O. 39, R. 4 of the Civil Procedure Code an original order of injunction passed by a Court is not capable of being varied or modified without any fresh material or ground being disclosed. Consequently the varying of such an order on the ground that the petitioner had sufficient cause for not appearing at the time of the original hearing is not justifiable.

B. Jagannadhadoss for Appellant.

G. Lakshmanna and *G. Chandrasekara Sastri* for Respondent.

N.S.

Kumaraswami Sastri and Reilly, JJ. C.M.P. Nos. 649 and 650 of 1929.
5*th April*, 1929.

Civil Procedure Code, O. 45, R. 4—Consolidation of appeals—Grounds for—Discretion of Court.

Under O. 45, R. 4 of the Civil Procedure Code the question of consolidation of appeals is a matter of discretion to be exercised by the Court; the word "may" in the rule does not mean "shall."

Their Lordships declined to consolidate several rent suits filed by a Zamindar against the tenants for the purpose of enabling the Zamindar to file an appeal to the Privy Council on the ground that it would be a great hardship on the tenants to compel them to appear before the Privy Council.

K. Bhashyam Aiyangar and *T. R. Srinivasan* for Petitioner.

T. M. Krishnaswami Aiyar and *K. R. Venkatarama Sarma* for Respondents.

N.S.

Phillips and Madhavan Nair, JJ. A.S. No. 176 of 1927.
3rd April, 1929.

Mortgage—Suit on—Decree—Execution—Sale—Purchase by decree-holder—Sale by decree-holder purchaser to a stranger—Purchase benami for the mortgagor—Right of puisne mortgagee.

The first mortgagee obtained a decree on his mortgage and purchased the mortgaged properties in execution of his decree. A stranger purchased these properties from him *benami* for the mortgagor. The mortgagor filed a suit for recovery of these properties from the stranger and it ended in a compromise by which the stranger was to reconvey the properties to the mortgagor on payment of certain amount. As the mortgagor had no money, he borrowed this amount from another person and the property after it was got back by the mortgagor was conveyed to this person. The puisne mortgagee instituted a suit on his mortgage and impleaded the mortgagor and his assignee as defendants.

Held, that the mortgagor having purchased the mortgaged properties, though not directly in the execution proceedings, the prior mortgage cannot be said to have been intended to be kept alive and the properties were liable to the claim of the puisne mortgagee, and that the mortgagor's assignee was not entitled to priority in respect of the amount advanced by him as the same was not advanced for the purpose of discharging any prior obligation on the properties.

C. S. Venkatachariar and *K. R. Rangaswami Aiyangar* for Appellant.

S. Varadachariar, T. M. Ramaswami Aiyar and *R. Krishnaswami Aiyangar* for Respondents.

N.S.

Wallace and Walsh, JJ. C.M.A. No. 516 of 1928.
5th April, 1929.

Civil Procedure Code, O. 21, R. 2; O. 23, R. 3 and O. 34, R. 5—Preliminary decree in a mortgage suit—Application for final decree—Absence of notice to judgment-debtor—Final decree if void—Private adjustment after preliminary decree—Validity of.

There is nothing in the Civil Procedure Code which requires the giving of notice to the judgment-debtor at the time an application for a final decree is made and consequently the failure to give such a notice does not make the final decree *ipso facto* illegal.

An adjustment out of Court subsequent to the preliminary decree in a mortgage suit cannot be recognised by the Court; O. 21, R. 2 of the Civil Procedure Code does not apply, as an application for a final decree is not one in execution. O. 23, R. 3 of the Civil Procedure Code cannot be invoked to apply to an adjustment after the passing of a decree in the suit.

K. V. Sesha Aiyangar for Appellant.

P. R. Ganapathi Aiyar and *K. P. Panchapakesa Aiyar* for Respondents.

N.S.

Walsh, J. C.R.P. No. 1506 of 1927.
8*th April*, 1929.

Civil Procedure Code, S. 115—*Election of President for District Board—Petition for setting aside election—Dismissal of—Revision—Madras Local Boards Act, Ss.* 14 *and* 15, *cl.* (2)—*Eligibility of outgoing President for election.*

The High Court will not interfere in revision against an order of the Lower Court holding than an outgoing President of the District Board is eligible for re-election, even if the order is based on a misconstruction of the sections of the Local Board, as no question of jurisdiction is involved.

47 Mad. 869 and (1927) M.W.N. 842 referred to.

Obiter: An outgoing President of the District Board is eligible for re-election.

T. V. Muthukrishna Aiyar, N. Muthusami Aiyar and *V. C. Viraraghavachariar* for Petitioner.

P. Venkataramana Rao for Respondent.

N.S.

The Chief Justice and Walsh, J. L.P.A. No. 176 of 1926.
12*th April*, 1929.

Trust—Office of dharmakarthaship—Acquisition by prescription.

A dharmakarthaship of a temple can be established by prescriptive possession for over 12 years.

T. S. Ramaswami Aiyar and *V. Sundaram Aiyar* for Appellant.

V. S. Govindachariar for Respondent.

N.S.

Ramesam and Jackson, JJ. A.S. No. 394 of 1924.
15*th April*, 1929.

Evidence Act, S. 92 (4)—*Scope of—Suit on mortgage—Plea of payment of less amount and acceptance of same by the mortgagee—Admissibility of evidence.*

Though an unregistered agreement between the mortgagee and the mortgagor agreeing to receive a smaller amount than that due under the mortgage may not be admissible in evidence, the fact of payment of the smaller amount by the mortgagor to the mortgagee and acceptance of the same by the mortgagee in full discharge of the mortgage can be proved.

44 B. 55 not followed.

Case-law on the subject discussed.

K. V. Krishnaswami Aiyar for Appellant.

T. R. Venkatarama Sastri for Respondent.

N.S.

The Chief Justice and Walsh, J.
3rd April, 1929.

L.P.A. No. 262 of 1925.

Hindu Law—Promissory note by father—Prior suit by son against father—Compromise decree for partition—Suit on promissory note against father—Decree—If creditor can proceed against son's share.

A promissory note was executed by a father to a creditor when a suit between the son and the father was pending regarding some disputes. The suit ended in a compromise decree effecting a partition between the parties. Subsequently the creditor filed a suit on the promissory note and obtained a decree against the father alone and attached and purchased in Court auction the son's share also.

In a suit by the sons to set aside the sale of their shares on the ground the creditor could not proceed against their shares,

Held that, although the decree was only against the father, still as the promissory note must be deemed to have been executed before a partition was effected, the debt was binding on the sons also and the creditor had a right to proceed in execution against the son's share also.

50 M. 535 (F.B.) and 51 M. 361 (F.B.) followed.

K.P. Ramakrishna Aiyar for Appellant.

K. S. Krishnaswami Aiyangar and *C. Narasimhachariar* for Respondent.

N.S.

The Chief Justice and Walsh, J.
8th April, 1929.

Cr.R.C. No. 921 of 1928.

Penal Code, Ss. 116 *and* 161—*Offer of a bribe to a Police Officer when he is* functus officio—*If amounts to abetment of bribery under section* 161.

Where the accused had applied to be taken into the Police service, but his application was finally rejected by the Reserve Inspector and the District Superintendent and thereafter he offered a bribe to the Inspector to reconsider the decision,

Held that, the officer having become *functus officio,* there was no longer any bribe offered to do anything in the discharge of public duty and there was therefore no offence committed under Ss. 116 and 161, Indian Penal Code.

47 M.L.J. 662 and 21 C.W.N. 552 referred to.

K. P. Ramakrishna Aiyar for Petitioner.

Venkataraghavachari for The Public Prosecutor.

N.S.

N R C

The Chief Justice, Wallace and Anantakrishna Aiyar, JJ. O.S.A. No. 38 of 1926.
9th April, 1929.

Hindu Law—Partition—Share allotted to a member of a branch at a prior separation of member—Subsequent general partition—Mode of division—Share allotted to separating member, if to be deducted from share of his branch.

The share allotted to a separating member of a joint Hindu family, the other members remaining joint, must be deducted from the share to be allotted to the remaining members of that particular branch to which he belonged, at a subsequent general partition of joint family property. Principles discussed. 5 M. 362 followed.

K. S. Krishnaswami Aiyangar for Appellant.

V. V. Srinivasa Aiyangar and *T. L. Venkatarama Aiyar* for Respondents.

P.R.N.

Anantakrishna Aiyar, J. S.A. No. 1562 of 1925.
16th April, 1929.

Mortgage—Post diem *interest—Interest upon arrears of interest—When can be awarded.*

The material portion of a mortgage deed was as follows:—"As I have received this day Rs. 1,000 in cash for the marriage expenses of my son, I shall pay from this day for the above amount at three-fourth per cent. per mensem for the term of two years, the interest for each year to be paid in two instalments (தடவை) in the year on November 23rd and May 23rd. In case of failure to pay as above I shall pay interest on the above interest amount at one per cent. per mensem. On 23rd May, 1911, the end to the term, after deducting interest paid I shall pay the balance interest and the principal."

Held, that in a suit upon this mortgage, *post diem* interest was awardable as well as interest upon arrears of interest after the date of the period fixed in the document for the re-payment of the principal.

19 All. 39 (P.C.) followed.

35 All. 534 not followed.

T. Arumanatham Pillai for *P. S. Ramaswami Aiyangar* for Appellant.

N. Swaminathan for Respondent.

N.S.

Ramesam and Jackson, JJ. L.P.A. No. 118 of 1926.
18th April, 1929.

Madras District Municipalities Act, Ss. 82 (2), 345 *and Sch. IV, Rule* 15—*Assessment of property tax—Period within which it can be revised.*

The revision of the assessment of property tax need not necessarily be made within the year for which the tax is levied but can be made even afterwards at any time before three years after which no suit can be brought for the recovery of the amount under S. 345 of the District Municipalities Act.

K. Bhashyam Aiyangar for Appellant.

R. N. Aingar instructed by *King and Partridge* for Respondent.

N.S.

Waller and Anantakrishna Aiyar, JJ. S.A. Nos. 348 to 381 of 1925.
22nd April, 1929.

Madras Estates Land Act, S. 26 (3)*—Landholder—Receiver.*

A Receiver appointed to manage the properties pending an appeal to the Privy Council against the decree of the High Court concerning those properties is a landholder of the properties within the meaning of S. 26, cl. (3) of the Madras Estates Land Act.

L. A. Govindaraghava Aiyar and *S. A. Seshadri* for Appellant.

S. Ramaswami Aiyar and *D. Kumaraswamiah* for Respondents.

N.S.

Kumaraswami Sastri, J. Application No. 802 of 1929.
23rd April, 1929. C.S. No. 420 of 1922, Mad. H.C.
C.S. No. 510 of 1926, Bom. H.C.

Civil Procedure Code—Foreign adjudication—Prior attachment in British Indian Court—Effect—Order 21, *Rule* 53*—Compromise pending attachment—Validity—Provincial Insolvency Act, S.* 53 *considered.*

Under a decree of the Bombay High Court a preliminary decree of the Madras High Court was attached. A compromise was sought to be entered into between the judgment-debtor of the Bombay High Court and his own judgment-debtors. Meanwhile judgment-debtors in the Bombay High Court were adjudicated in Secunderabad.

On the application of the Bombay attaching decree-holder,

Held, Definition of "Foreign Court" in S. 2, cl. (5) of Civil Procedure Code is for purposes of the Code only. 36 Cal. 233 at 236. Secunderabad Court is a foreign Court. 21 Cal. 177. Attachment in a British Indian Court continues and Official Receiver takes only subject to equities. 1910 A.C. 508.

Held also compromise not valid so long as attachment remains in force—Order 21, Rule 53, Civil Procedure Code.

Relevant authorities and enactments fully discussed.

S. Duraiswami Aiyar and *A. K. Ramachandra Aiyar* for Applicants.

V. V. Srinivasa Aiyangar and *V. Radhakrishnayya* for Respondents.

T. Ramachandra Rao for Official Receiver, Secunderabad

K.S.

Wallace, Beasley and Madhavan Nair, JJ. C.M.P. Nos. 5167 and 5168 of 1928.

24th April, 1929.

Madras Land Revenue Assessment Act (1876), *Ss.* 6 *and 7—Applications for registration by rival claimants—Order of Collector referring parties to Civil Court—Board of Revenue setting order aside on Appeal—Legality—Application to High Court for writ of certiorari—Maintainability.*

Where rival claimants applied to the Collector for registration under the Madras Land Revenue Assessment Act (1876), but the Collector, without holding an enquiry at all, referred them to the Civil Court, and on appeal to the Board of Revenue, the Board set that order of the Collector aside, as being null and void, and directed him to hold an enquiry, and the petitioner filed an application in the High Court for a writ of certiorari to restrain the Collector from proceeding with the enquiry,

Held, that the order of the Collector referring the parties to the Civil Court was not one "refusing to register" within the meaning of S. 6 of the Madras Land Revenue Assessment Act, but amounted to a failure to exercise a jurisdiction vested in him by the Act, and was as such null and void, and that the enquiry ordered by the Board of Revenue in appeal should proceed and that the application for a writ of certiorari should be dismissed.

Sir C. P. Ramaswami Aiyar and *K. P. Ramakrishna Aiyar* for Petitioners.

V. V. Srinivasa Aiyangar and *K. S. Desikan* for Respondent.

The Government Pleader for the Government.

P.R.N.

Waller and Anantakrishna Aiyar, JJ. Cr.R.C. No. 941 of 1928.

29th April, 1929.

Criminal Procedure Code, S. 256*—Person asked to furnish security for his behaviour—If can avail himself of the provisions of the section.*

The following question was referred to a Full Bench: "Whether a person called upon to furnish security for good behaviour is entitled to the benefit of the provisions of S. 256 of the Criminal Procedure Code."

Nugent Grant and *R. Kesava Aiyangar* for Petitioner.

N. S. Mani for The Public Prosecutor.

N.S.

Waller and Anantakrishna Aiyar, JJ. L.P.A. No. 38 of 1929.
30th April, 1929.

Letters Patent (Madras), cl. 15—*Second Appeal—Decree—Order of refusal of Judge to give leave to appeal—Appeal—Maintainability.*

No appeal lies under cl. 15 of the Letters Patent against an order of a single Judge of the High Court refusing to grant leave to appeal against his judgment in a second appeal.

Ch. Raghava Rao for Appellant.

P. Venkataramana Rao, A. Lakshmayya and *D. Krishnaswami* for Respondents.

N.S.

Krishna Pandalai, J. S.A. No. 1277 of 1926.
30th April, 1929.

Contract—Agreement to execute melcharth and create kanom—Part of the amount paid—Suit for specific performance by person in whose favour the melcharth was executed—Maintainability.

Where a landlord agreed to execute a melcharth in favour of another and create a kanom of Rs. 1,000 over his properties and in pursuance of this agreement received Rs. 450 and, subsequently, the person in whose favour the melcharth was executed brought a suit for specific performance of this agreement offering to pay the balance due,

Held, that the suit was really one to enforce a contract to grant a kanom lease and not one to enforce a contract to lend money and consequently was maintainable.

K. P. Ramakrishna Aiyar for Appellant.

K. Kuttikrishna Menon and *A. Parameswara Aiyar* for Respondents.

N.S.

Wallace, Beasley and Madhavan Nair, JJ. C.R.P. No. 234 of 1926.
1st May, 1929.

Civil Procedure Code, O. 21, *R.* 100—*Application under—Dismissal for default—Restoration—Power of Court—O.* 9, *R.* 9—*Applicability.*

Held, that Order 9, Rule 9 does not apply to execution proceedings except when the order in such proceedings amounts to a decree and falls under S. 47 of the Civil Procedure Code; and consequently a Court has no power to restore an application under Rule 100 of Order 21, which has been dismissed for default, as such an application is one in execution.

Held further, that the Court had no inherent power to restore the same.

P. R. Srinivasan and *P. N. Appusami Aiyar* for Petitioner.

S. Krishnaswami Aiyar (Court guardian) for Respondents.

P.R.N.

The Chief Justice, O.P. No. 115 of 1928.
Odgers and Beasley, JJ.
1st May, 1929.

Income-tax Act, S. 10 (2) (*ix*)—*Foreign Railway Company—Payment of share of profits to Colonial Government under agreement—If can be deducted for the purpose of computing profits for income-tax.*

A foreign Railway Company had to pay half the profits to the Colonial Government in consideration of the permission granted to the Company for constructing the railway line under an agreement entered into between the Government and the Company. On a question arising as whether such profits paid should be deducted in computing profits:

Held, that the amount paid was not expenditure incurred before ascertainment of profits, but was only a payment out of the profits and hence could not be deducted under section 10 (2) of the Income-tax Act, in computing profits for purposes of income-tax.

A. Krishnaswami Aiyar (*Advocate-General*) instructed by *King and Partridge* for Assessee.

M Patanjali Sastri for The Commissioner of Income-tax.

P.R.N.

Jackson, J. C.M.S.A. No. 199 of 1927.
2nd May, 1929.

Civil Procedure Code, O. 21, *R.* 2—*Uncertified payment—Jurisdiction of executing Court.*

Where a decree-holder stated in his execution application that a certain amount had been paid by the judgment-debtor to the decree-holder, but the same had been appropriated by the decree-holder for some other claim,

Held, that the executing Court could have jurisdiction to enquire into the fact of his uncertified payment as the payment was brought to the notice of the Court by the decree-holder himself and not the judgment-debtor.

A. C. Sampath Aiyangar for Appellant.

S. Varadachariar and *N. C. Vijayaraghavachariar* for Respondents.

N.S.

[END OF VOL. LVI.]